IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-144

RONALD STEVEN MENDEL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Ronald Steven Mendel, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, reversing the order of the District Court suppressing evidence seized pursuant to a search warrant.

OPINION BELOW

The opinion of the United States District Court for the Northern District of Illinois is not officially reported and is printed as Appendix A to this petition. The opinion of the United States Court of Appeals for the Seventh Circuit is not yet officially reported and is printed as Appendix B to this petition. The judgment of the United States Court of Appeals is printed as Appendix C to this petition. The order denying the Petition for Rehearing With Suggestions Of Rehearing En Banc is printed as Appendix D to this petition.

JURISDICTION

The opinion of the Court of Appeals, reversing the order of the District Court, was filed on May 10, 1978. The Petition for Rehearing with Suggestion Of Rehearing En Banc was filed on May 24, 1978, and was denied on June 28, 1978. The jurisdiction of this court is invoked under 28 U.S.C., Sec. 1254.

QUESTION PRESENTED

1. Whether Rule 41(c) of the Federal Rules of Criminal Procedure was violated by the issuance of a search warrant based upon a pre-printed form which contained only the name and address of the place to be

searched and the items to be seized but no facts establishing probable cause, which were contained solely in oral testimony before the United States Magistrate, which was later transcribed and taped to the form sometime after it had been executed.

2. Whether failure to comply with the requirement of Rule 41(c) that the authorization for a nighttime search be noted on the face of the warrant requires that evidence seized after 10:00 p.m. be suppressed.

FEDERAL RULES INVOLVED

Rule 41(c) Of The Federal Rules Of Criminal Procedure

(c) Issuance and contents. A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the

property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

Amended Rule 41(c), Effective October 1, 1977

(c) Issuance and Contents.

(1) Warrant Upon Affidavit. A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

(2) Warrant Upon Oral Testimony.

(A) General Rule. If the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means.

(B) Application. The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate. The Federal magistrate shall enter, verbatim, what is so read to such magistrate on a document to be known as the original warrant. The Federal magistrate may direct that the warrant be modified.

(C) Issuance. If the Federal magistrate is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist or that there is probable cause to believe that they exist, the Federal magistrate shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate's name on the duplicate original warrant. The Federal magistrate shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

(D) Recording and Certification of Testimony. When a caller informs the Federal magistrate that the purpose of the call is to request a warrant, the Federal magistrate shall immediately place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. If a voice recording device is available, the Federal magistrate shall record by means of such device all of the call after the caller informs the Federal magistrate that the purpose of the call is to request a warrant. Otherwise a

stenographic or longhand verbatim record shall be made. If a voice recording device is used or a stenographic record made, the Federal magistrate shall have the record transcribed, shall certify the accuracy of the transcription, and shall file a copy of the original record, and the transcription with the court. If a longhand verbatim record is made, the Federal magistrate shall file a signed copy with the court.

(E) Contents. The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

(F) Additional Rule for Execution. The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.

(G) Motion to Suppress Precluded. Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this paragraph is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.

STATEMENT

During the week preceding September 28, 1976, agents of the Drug Enforcement Administration were conducting an investigation of petitioner and others suspected of purchasing chemicals for the unlawful manufacture of methamphetamine. At about 11:00 a.m., on September 28, 1976, agents took up surveillance of a coachhouse located at 1910 North Mohawk, Chicago, Illinois, where the defendant had been seen coming and going with items purchased from a chemical supply company. During their surveillance the agents smelled ether coming from the coachhouse, which indicated to them that the process of manufacturing methamphetamine was in its last stages. At approximately 3:20 p.m., agents concluded that they had probable cause for obtaining a search warrant for the premises.

At approximately 4:30 p.m., the agents went to the office of the United States Attorney for assistance in obtaining a search warrant. An Assistant United States Attorney, using a printed form entitled "Affidavit For Search Warrant", filled in some blanks, indicating the name of the place to be searched and the items to be seized. In the space preceded by language stating "And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows", the words "(SEE ATTACHED AFFIDAVIT)" were typed. No affidavit was ever attached to the form, however, and the words were later crossed out, by hand, and in their place was the handwritten notation "Tape to be typed later and attached".

Several hours later, at approximately 9:00 p.m., the Assistant United States Attorney, Agent Ripley, another DEA agent and a DEA chemist went to the home of United States Magistrate James T. Balog, with the undersigned printed form. The tape recorder was turned on and Agent Ripley stated orally, under oath, facts which he believed to be probable cause for the issuance of the warrant. At the conclusion of his presentation, which was interrupted several times by the Assistant United States Attorney and the Magistrate, the Magistrate announced that he would issue the warrant and noted the time to be 9:24 p.m. After a brief unrecorded discussion, the tape recorder was turned back on and the Magistrate announced that he would authorize the execution of the search warrant after 10:00 p.m., provided it was executed within one hour after petitioner and his companions returned to the premises. It was not until sometime thereafter that the proceedings before the Magistrate were transcribed and attached to the printed form, which had theretofore been executed by Agent Ripley. On the same night, after obtaining the search warrant, the agents returned and took up surveillance of the premises. Sometime between 10:00 and 11:00 p.m., the warrant was executed and a quantity of the controlled substance, methamphetamine, was seized from the coachhouse. Petitioner and two companions, Kerry Lowell Gress and Elizabeth Reeves, were arrested and subsequently indicted for possession and manufacture of the controlled substance under 21 U.S.C., §§ 841(a)(1) and 846.

Petitioner and his co-defendants moved to suppress the evidence obtained on the grounds that the search warrant did not meet the requirements or comply with the procedure set forth in Rule 41(c) of the Federal

Rules of Criminal Procedure. The district court granted the motion to suppress on the grounds that probable cause for the issuance of the warrant was not set forth in a written affidavit. The government appealed to the United States Court of Appeals for the Seventh Circuit.

On appeal the order of the district court was reversed. The Court of Appeals observed that:

> "We believe the District Court's reading of the rule was unduly narrow, and that the recording of the sworn statement made before the magistrate was properly incorporated by reference into the affidavit and made a part of it . . ." (Appendix, p. 8a)

After referring to the 1972 amendment to Rule 41(c), providing that recorded sworn oral testimony by the affiant in the presence of the magistrate should be considered as part of the affidavit, the Court said:

> Thus the magistrate may consider sworn oral testimony in determining whether the grounds for issuing a warrant exist. The only reason that the procedure employed in the case at bar arguably was not expressly authorized by the sentence just quoted is that the text of the affidavit itself, although it described the place to be searched, the articles to be seized, and the crime suspected, did not state any of the facts showing probable cause, except by reference to the tape, and left all those facts to be supplied by the oral statement. The rule's first sentence, which says the "affidavit" must establish "the grounds for issuing the warrant," is heavily relied upon. Yet if some but not all of those facts had appeared in the text of the affidavit and the others only on the tape there would be no doubt that the rule was complied with; for otherwise the procedure authorized by the fourth sentence would be superfluous. We think the rule contemplates that in either case the recording, when incorporated by reference, is to be considered a part of the affidavit. (Appendix, pp. 9a-10a)

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari in order to review the Court of Appeals' interpretation of Rule 41(c) of the Federal Rules of Criminal Procedure which provides that search warrants shall issue "only on an affidavit or affidavits . . . establishing the grounds for issuing the warrant." The rule obviously contemplated that the facts in support of probable cause be stated in written form in an affidavit and not in oral testimony, such as used and relied upon in the instant case.

The Court of Appeals below held that Rule 41(c) permits issuance of a search warrant where the government uses a pre-printed form labeled "affidavit" to which is added only the description of the place to be searched and the items to be seized, but which contains no facts establishing probable cause. The Court of Appeals incorrectly relies upon the provision of the rule which permits the taking of oral testimony, if such oral testimony is later transcribed, and incorrectly concluded that all of the facts tending to establish probable cause could be supplied by oral testimony and that the affidavit needs to contain no facts tending to establish probable cause.

Petitioner contends that the district court correctly concluded that the words "affidavit . . . establishing the grounds for issuing the warrant" required that probable cause be stated, in writing, in the affidavit. In reversing this ruling, the Court of Appeals ignores the clear and plain language of Rule 41(c) and the expressed requirement of a written statement of the facts to be relied upon by the judge or magistrate in issuing a search warrant.

Although Rule 41(c) does provide that the magistrate may examine the affiant as long as the proceeding is taken down by a court reporter and made a part of the affidavit, this portion of the rule is obviously intended to supplement the information offered to establish probable cause and contained in the written affidavit. For example, where the affiant is present before the magistrate, the rule permits the magistrate to ask questions for the purpose of supplementing or clarifying the affidavit, but this provision was never intended to authorize the use of oral testimony alone as a complete substitute for an affidavit which establishes grounds for issuing a warrant.

The error of the Court of Appeals is appreciated when viewed in light of the fact that at one time there was a conflict among the circuits as to whether oral testimony could be used to supplement a written affidavit. This conflict was resolved by amendment to the Rule in 1972 to permit the affidavit to be supplemented by the oral testimony under oath. See 18 U.S.C., Rule 41, *Notes of the Advisory Committee, 1972 Amendment.* Congress and this Court were careful, however, not to abandon the underlying requirement of an affidavit setting forth the grounds for issuance of the warrant.

The reasons for granting certiorari are rendered no less important by the amendment of Rule 41(c) in 1977, but are in fact of increased importance. The requirement of Rule 41(c)(1) to the effect that a warrant shall issue only "on an affidavit or affidavits . . . establishing the grounds for issuing the warrant" was retained, but this requirement of a written affidavit was distinguished from "oral testimony" which is permitted in support of a warrant under Subdivision (2) of Rule 41(c).

Subdivision (2) provides that if "circumstances make it reasonable to dispense with the written affidavit, a

Federal magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means." Although interpretation of this Rule is not before this Court at this time, it is quite apparent that neither the old rule nor the 1977 amendments intended to abolish the requirement of a written affidavit except where "circumstances make it reasonable to dispense with a written affidavit." The 1977 amendments, however, clarify the fact that under no circumstances could the written affidavit be altogether dispensed with prior to these amendments.

The unusual decision of the Court of Appeals, below, along with the existence of a new amendment which may lead magistrates and prosecutors to avoid use of written affidavits in lieu of oral testimony in support of warrants, suggest that certiorari be granted to clarify and reaffirm the requirement of a written affidavit in support of search warrants.

The Court of Appeals' opinion would be less offensive to the rule if we were faced with a situation where the exigencies did not allow sufficient time for agents to prepare a sufficient affidavit. But in the instant case, the agents were in possession of the information upon which they relied in the afternoon and, instead of preparing a written affidavit setting forth the facts upon which they relied to establish probable cause, the agents casually waited until 9:30 in the evening, when they orally presented these facts to the magistrate. The district court, therefore, correctly concluded that this violation of Rule 41(c) was not a mere technicality and ruled that the evidence be suppressed. This Court may also want to consider whether these facts present sufficient reason for dispensing with the affidavit under the 1977 amendments.

The Court of Appeals also suggests there is "no basis for an inference that the government agents intentionally disregarded a provision in the rule." (Appendix, p. 15a) The Court goes on to point out that "There is no evidence that they believed the procedure they followed violated the rule, and we can hardly say they acted unreasonably in adopting the interpretation of the rule we have held to be correct." (Appendix, p. 15a) The rule is intended to be interpreted and to be applied by the magistrate and the courts, not by agents. We believe that the court's opinion sets a dangerous precedent by approving the error by agents in interpreting the rules of procedure intended for the court.

While recognizing that the government also failed to comply with the provisions which required that authorization for a nighttime search be noted upon the face of the warrant, the panel opinion concludes that "the technical violation of the rule does not require suppression." (Appendix, p. 15a) The requirement that warrants be executed in the daytime unless the magistrate specified a nighttime search and notes it on the face of the warrant, was intended to prevent the abuses attendant upon nighttime searches and was certainly intended to be taken seriously. A citizen awakened at night, by a knock on the door, is entitled to be shown a warrant which, on its face, properly authorizes a nighttime search. The Court of Appeals' opinion characterizes this violation as a "technical" violation which is therefore somehow less offensive. But all violations of Rule 41(c) are "technical" violations, as are violations of the Fourth Amendment itself. This Court, in promulgating these rules, obviously had ample reason to require that the magistrate note his authorization for a nighttime search on the face of

the warrant. The magistrate had no authority to disregard these rules.

The Court of Appeals also concluded that because "no conceivable prejudice to the defendants has resulted from the procedures used, any doubts should be resolved in favor of the validity of the warrant." We are unable to understand the lower court's conclusion that no prejudice resulted to the defendants. They were subjected to a search and seizure in violation of the rule and, as a result, were charged with the offense set forth in the indictment. They had to hire counsel and defend against those charges. Moreover, the lower court appears, by this rationale, to be setting the dangerous precedent that lack of a prejudicial consequence will excuse the violation of any rule or law. The conclusion that there has been "no conceivable prejudice" is so unrealistic that further argument is not necessary.

We also take issue with the Court of Appeals' conclusion that "any doubts should be resolved in favor of the warrant." On the contrary, we believe that, as this Court stated in *United States v. Bass*, 404 U.S. 336 (1971), when the government and a citizen disagree as to the application of a particular law, any doubt should be resolved in favor of the liberty of the citizen.

CONCLUSION

For all of the reasons stated above, it is respectfully requested that this Court grant a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit below.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

RONALD STEVEN MENDEL,
KERRY LOWELL GRESS and
ELIZABETH REEVES,
Defendants.

No. 76 CR 1042

MEMORANDUM OPINION AND ORDER

On March 4, 1977, this court issued a memorandum opinion and order granting the defendants' motions to quash the search warrant in question, and to suppress the evidence seized thereunder due to the insufficiency of the affidavit on which the warrant was based. The government suggested, however, that the circumstances surrounding the search and seizure may have justified a warrantless search. Pursuant to this suggestion, the court granted the government a hearing on the circumstances surrounding the search.

This court has heard the testimony of the agents and various other government witnesses involved in the search. Though the government has established probable cause for searching the premises involved, it has failed to establish the exigent circumstances necessary to carry out a warrantless search. Considering the agents' efforts to obtain a search warrant and the lapse of time between the agents' decision to obtain a warrant and the execution of the defective warrant, it is difficult to imagine how the government could possibly establish the

requisite exigent circumstances for a warrantless search. Consequently, the government's attempt to validate the search of the coachhouse in question on September 28, 1976, by establishing exigent circumstances for a warrantless search, must fail.

The government, since the hearing on the validity of a warrantless search, has filed a motion requesting this court to reconsider its opinion granting defendants' motions to quash the search warrant and to suppress the evidence seized thereunder. In support thereof, the government has directed this court's attention to the case of *United States v. Turner*, 76-1518 (2d Cir. June 2, 1977). We find that case to be factually distinguishable in that the search conducted therein was primarily at the behest of state officials, and the procedure followed for obtaining the search warrant in question attempted to comport with the requirements of California law. It was conceded in that case that because the duplicate original warrant was signed by a federal agent, not a "peace officer" under California law, the warrant was defective and would be quashed under California law. The Second Circuit, however, dealt with the questions of whether or not the warrant complied with the rigors of the Fourth Amendment and the requirements of Rule 41, Fed.R.Crim.P., since the case before them was a federal case. Finding the requirements of Fourth Amendment protection to have been complied with, the court turned its attention to Rule 41. At the outset of its opinion, the court said:

> "If there is a violation of Rule 41, such a violation will
>
> > not lead to exclusion unless (1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule.

> *United States v. Burke, supra*, 517 F.2d at 386-871 (footnotes omitted)."

The Second Circuit found no showing of "prejudice" resulting from the defective warrant procedure. And under the circumstances of the case at bar, this court would be hard pressed to find how defendants were "prejudiced" as that term is used in *United States v. Burke*, 517 F.2d 377 (2d Cir. 1975).

In discussing whether or not there had been an "intentional and deliberate disregard of a provision in the Rule," *Burke, supra* at 387, the court said:

> "Here, however, the search warrant application was made by state law enforcement personnel who made a good faith effort to comply with state procedural requirements, and who gave no thought to compliance with the federal Rule. There is no suggestion that the federal officers, whose involvement was relatively minor, sought to use the state procedures in order to evade the provisions of Rule 41. Exclusion under such circumstances could have no deterrent effect and would not 'tend to enforce decent police practices . . .'"

In the case at bar, however, we are dealing with federal officials well versed in the requirements of Rule 41. Though they may have acted in good faith, the fact remains that the affidavit requirement for compliance with Rule 41 was not met. This court does not consider this to be a mere technicality, as the government suggests. The motion to reconsider this court's earlier ruling quashing the warrant and suppressing the fruits of the search is denied.

The government further asserts that defendants Mendel and Reeves lack standing to challenge the legality of the search and seizure. It is conceded that defendant Gress was renting the coachhouse which was searched. Defendant Gress, therefore, had a possessory interest in the premises searched, and his standing to challenge the legality of the search is unquestioned.

The government seeks to challenge the standing of the other defendants by showing a narrow construction of the "automatic standing rule" set forth in *Jones v. United States*, 362 U.S. 257 (1960). Because we do not find the "automatic standing rule" to be necessary for a determination of the standing of defendants Mendel and Reeves, we do not discuss the case of *United States v. Prueitt*, 540 F.2d 995 (9th Cir. 1976).

Defendants Mendel and Reeves have each offered to submit further evidence, in the form of testimony, in support of their possessory interest in the searched premises and their concommitant expectation of privacy. We find no further evidence to be necessary. From the facts set forth by the government agents at the hearing held in this matter, it is clear that the defendants Mendel and Reeves were legitimately on the premises when the search took place and were, in fact, targets of that search. Therefore, under the alternative holding of *Jones v. United States, supra*, at 267, see also, *Brown v. United States*, 411 U.S. 223, 227 fn. 2 (1973), and under the holding of *United States v. Jeffers*, 342 U.S. 48 (1951), we find defendants Mendel and Reeves to have standing to challenge the search of the coachhouse.

In accordance with the foregoing, the motion for reconsideration of this court's order of March 4, 1977, quashing the search warrant in question and suppressing the evidence seized thereunder as to all defendants, is denied.

Enter:

/s/ Frank J. McGarr
United States District Judge

Dated: September 29, 1977

APPENDIX B

In the
United States Court of Appeals
For the Seventh Circuit

No. 77-1421

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

RONALD STEVEN MENDEL, KERRY LOWELL GRESS and ELIZABETH REEVES,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 CR 1042—**Frank J. McGarr**, *Judge.*

ARGUED APRIL 4, 1978—DECIDED MAY 10, 1978

Before SPRECHER and TONE, *Circuit Judges*, and JAMESON, *Senior District Judge.**

TONE, *Circuit Judge.* The government appeals under 18 U.S.C. § 3731 from an order of the District Court suppressing evidence seized pursuant to a search warrant. The ground for suppression was that the affidavit for a search warrant was insufficient, because, instead of reciting within its four corners the facts constituting

* The Honorable William J. Jameson, Senior District Judge of the United States District Court for the District of Montana, is sitting by designation.

probable cause, it incorporated those facts by reference to a tape recording of oral statements made under oath before the issuing magistrate. We hold the affidavit sufficient and reverse the order.

For approximately one week before September 28, 1976, agents of the Drug Enforcement Administration carried on an investigation that eventually led them to believe the coach house at 1910 North Mohawk, Chicago, Illinois, was being used for the unlawful manufacture of the controlled substance methamphetamine. Commencing at about 11:00 A.M. that day several agents maintained a continuous surveillance of the coach house. By about 3:20 P.M. they concluded that probable cause existed for obtaining a warrant. They knew from their earlier investigation and from their surveillance that day that quantities of chemicals used in manufacturing methamphetamine had been brought to the subject premises. They smelled ether, which appeared to be emanating from the coach house, indicating to them that the process of manufacturing methamphetamine was in its last stages and that therefore a search should be made promptly if they were to obtain evidence of manufacture.

At about 4:30 P.M. one or more of the agents appeared at the office of the United States Attorney and sought assistance in obtaining a search warrant. An Assistant United States Attorney, using a printed form entitled "Affidavit for Search Warrant," prepared an affidavit to be executed by Special Agent Richard L. Ripley. The document recited that the affiant had reason to believe that on the subject premises, which were carefully identified and described, were concealed certain articles that were means, instrumentalities, fruits, and evidence of the crime, which was also described. After the printed words, "And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows," the words "(SEE ATTACHED AFFIDAVIT)" were typed but then crossed out by hand, and in their place the words, "Tape to be typed later and attached," were written in by hand.

At 9:00 P.M. that evening the Assistant United States Attorney, Agent Ripley, another DEA agent, and a DEA chemist took the unsigned affidavit and a tape

recorder to United States Magistrate James T. Balog at his home in Chicago. With the tape recorder operating, Agent Ripley was sworn and then proceeded to state in considerable detail the facts upon which he based his belief of probable cause. His statement was interrupted several times by questions from the Assistant United States Attorney and the magistrate. At the conclusion of the presentation, the magistrate announced that he was satisfied as to probable cause and that he would issue the warrant. The time was announced to be 9:24 P.M. The recorder was turned off at this point and then within a minute turned back on to record a discussion about when the search would be conducted.[1] After hearing why there was good reason to delay the search until after the defendants, who had left the premises, returned,[2] the magistrate announced that he would authorize the search after 10:00 P.M. provided it was conducted within one hour after the defendants' return. Sometime during the proceedings, Agent Ripley signed the affidavit form under oath. The magistrate issued the search warrant. Later, the proceedings recorded on the tape were transcribed, and the magistrate certified to the accuracy of the transcript.

The agents executed the search warrant, seized the subject articles, and arrested the defendants, who were later indicted for offenses under the controlled substance law, 21 U.S.C. §§ 841(a)(1) and 846.

The defendants moved to suppress the evidence on the ground that the procedure by which the warrant was obtained had not complied with Rule 41(c), Fed. R.

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[1] Rule 41, Fed. R. Crim. P., provides that the search warrant shall be executed between 6:00 A.M. and 10:00 P.M. unless, upon a showing of reasonable cause, the issuing authority authorizes otherwise and makes an appropriate notation in the warrant.

[2] The other agent present stated that an interruption of the chemical process by which methamphetamine is made creates a risk of explosion, and, therefore, they always "like to have one of the chemists present that is actually operating the lab." He said the defendants had gone out and might not return by 10:00 P.M.

Crim. P.,[3] and in particular the first sentence of that rule, which provides as follows:

> A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant.

The asserted defect was that the sworn statement of probable cause was not set out in the affidavit itself. The District Court suppressed the evidence on that ground.[4] This appeal followed.

We believe the District Court's reading of the rule was unduly narrow, and that the recording of the sworn statement made before the magistrate was properly incorporated by reference into the affidavit and made a part of it. Whatever the situation before the 1972 amendment to Rule 41(c),[5] that amendment evidences an

[3] Rule 41(c), as it stood at the time of the issuance of the warrant in this case, became Rule 41(c)(1), effective August 1, 1976. See Pub. L. 94-349, § 1, 90 Stat. 822 (1976). New subparagraph (c)(2) of the 1976 amendment proposed by the Supreme Court was delayed and revised by Congress before it became effective on October 1, 1977. See Pub. L. 95-78, 91 Stat. 319.

[4] Subsequently, the government sought reconsideration of the order on the ground, *inter alia*, that there were exigent circumstances that would have justified a warrantless search. After an evidentiary hearing, the court held that exigent circumstances did not exist. The government also contended that two of the defendants lacked standing to challenge the search warrant, a contention also rejected by the District Court. The government does not challenge either of these rulings.

[5] Before that amendment, the circuits were divided on the question of whether facts adduced in a sworn oral statement before the magistrate but not set out in the affidavit, could be considered in determining whether probable cause existed. Compare, *e.g.*, *United States v. Hill*, 500 F.2d 315 (5th Cir.) *cert. denied* 420 U.S. 931 (1975), and *Leeper v. United States*, 446 F.2d 281, (10th Cir.) *cert. denied* 404 U.S. 1021 (1972), with *United States v. Anderson*, 453 F.2d 174 (9th Cir. 1971).

(Footnote continued on following page)

intention that a recorded sworn oral statement by the affiant made in the presence of the magistrate should be considered as a part of the affidavit. The fourth sentence of Rule 41(c)(1), added by the 1972 amendment, states as follows:

> Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witness he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit.

Thus the magistrate may consider sworn oral testimony in determining whether the grounds for issuing a warrant exist. The only reason that the procedure employed in the case at bar arguably was not expressly authorized by the sentence just quoted is that the text of the affidavit itself, although it described the place to be

[5] *continued*

The Notes of the Advisory Committee state that Rule 41(c), as originally adopted, effective March 21, 1946, was a restatement of existing law, former 18 U.S.C. §§ 613-616, 620 (§§ 3, 4, 5, 6, 10 of Title XI of the Espionage Act of June 15, 1917, 40 Stat. 228). Former § 614 required the issuing officer "before issuing the warrant to examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them." Thus the language of the statute prohibited oral supplementation of the written affidavit, and cases interpreting the statute so held. *Steele v. United States No. 1*, 267 U.S. 498, 501 (1924); *Poldo v. United States*, 55 F.2d 866, 868 (9th Cir. 1937). See *United States v. Innelli*, 286 F. 731, 732 (E.D. Pa. 1923). It was also held that § 614 required the affiant to subscribe to his written statement before the issuing officer, but that that officer need not cross-examine the affiant. *Rose v. United States*, 45 F.2d 459 (8th Cir. 1930).

We have found no case, however, either before or after the adoption of Rule 41(c), holding that oral testimony before the magistrate that had been recorded and incorporated by reference into an affidavit could not be considered in determining probable cause. The practice of incorporation by reference is of long standing. See *Siden v. United States*, 9 F.2d 241, 243 (8th Cir. 1925).

searched, the articles to be seized, and the crime suspected, did not state any of the facts showing probable cause, except by reference to the tape, and left all those facts to be supplied by the oral statement. The rule's first sentence, which says the "affidavit" must establish "the grounds for issuing the warrant," is heavily relied upon. Yet if some but not all of those facts had appeared in the text of the affidavit and the others only on the tape, there would be no doubt that the rule was complied with; for otherwise the procedure authorized by the fourth sentence would be superfluous. We think the rule contemplates that in either case the recording, when incorporated by reference, is to be considered a part of the affidavit.[4]

The words "such proceedings shall be taken down by . . . recording equipment and made part of the affidavit" cannot reasonably be interpreted to require that a transcript of the proceeding be physically incorporated into the body of the affidavit before the instrument is subscribed and sworn to. That procedure would require that the issuance of the warrant await the preparation of a transcript of the proceeding and the revision, retyping, resubscribing, and reverification of the affidavit. It is inconceivable that such a time-consuming, cumbersome, and pointless procedure was intended, especially in view of the likelihood that time will be of the essence when a search warrant is being sought.

The defendants, reasoning from the premise that the warrant was issued without an affidavit that showed grounds for probable cause, argue that such a practice was not authorized at all until the 1977 addition of paragraph (2) to Rule 41(c), and then only if based on a

[6] The Advisory Committee Notes to the 1972 amendment state:

> If testimony is taken it must be recorded, transcribed, and made part of the affidavit or affidavits. This is to insure an adequate basis for determining the sufficiency of the evidentiary grounds for the issuance of the search warrant if that question should later arise.

telephonic sworn statement.[7] We do not accept the premise, for the reasons we have already stated. We find nothing that alters our interpretation of Rule 41(c) in the 1977 amendment itself or in the House hearings leading to that amendment, to which the defendants also refer us, Proposed Amendments to the Federal Rules of Criminal Procedure, Hearings before Subcommittee on Criminal Justice of the Committee on Judiciary, House of Representatives, 95th Cong., 1st Sess. (1977) and Hearings Before Subcommittee on Criminal Justice of the Committee on the Judiciary, House of Representatives on H.R. 5865, 95th Cong., 1st Sess. (1977).

It is also argued that requiring the text of the written affidavit to include a written recital of the grounds for belief of probable cause is somehow more likely to assure a carefully considered decision by the magistrate. We disagree. The law generally prefers spontaneous oral testimony to a written affidavit. An affidavit, which can be and often is prepared by someone other than the affiant, is less likely to reflect fairly and accurately the affiant's own recollection or perception than spontaneous oral testimony. Moreover, oral presentation makes it possible for the magistrate to explore any points not adequately covered or left ambiguous by the witness' statement.[8] We recognized in *United States v. Brown*, 548 F.2d 204, 208 (7th Cir. 1977), the value of the oral sworn statement provided for in the 1972 amendment. And in

[7] Paragraph (2) provides that "when circumstances make it reasonable to do so," a warrant may issue "upon sworn oral testimony of a person who is not in the physical presence of a federal magistrate. . . ."

[8] See also the Advisory Committee notes to the 1972 Amendment:

> The provision . . . that the magistrate may examine the affiant or witnesses under oath is intended to assure him an opportunity to make a careful decision as to whether there is probable cause. It seems desirable to do this as an incident to the issuance of the warrant rather than having the issue raised only later on a motion to suppress the evidence. See L. Tiffany, D. McIntyre, and D. Rotenberg, *Detection of Crime* 118 (1967).

(Footnote continued on following page)

United States v. Noreikis, 481 F.2d 1177, 1178 (7th Cir.) *cert. denied* 415 U.S. 904 (1974) as to two defendants and judgment vacated as to third on other grounds, the court said,

> The magistrate must be given the facts so that he can make an independent judgment and not rely on the mere conclusions of the officer.

Oral testimony before the magistrate will often be more likely than an affidavit to assure that the magistrate will make an independant judgment based on the facts and not rely on the mere conclusions of the officer.

Our interpretation of Rule 41(c) is consistent with the purposes underlying the affidavit requirement, which are (1) to insure that the magistrate "may judge for himself the persuasiveness of the precise facts relied on to show probable cause," and (2) to provide a record upon which the reviewing court may properly determine the sufficiency of the facts presented to the magistrate to establish probable cause and whether they were in fact given under oath. *United States v. Anderson*, 453 F.2d 174, 177 (9th Cir. 1971). Both purposes were achieved by the procedure used in this case.

Our interpretation is also consistent with the approach adopted in *United States v. Ventresca*, 380 U.S. 102, 109 (1965), Just as

> the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common sense, manner,

[8] *continued*

That a conventional affidavit often fails to produce the desired "careful decision as to whether there is probable cause" was pointed out by the Tiffany, *et al.*, reference cited by the Committee:

> [T]here are some places, Chicago, for example, where it is common for motions to suppress to be granted. . . . This reflects in part the failure of the first judge to take the issue of the warrant seriously . . . . Whatever the explanation, this fact when it exists further detracts from the search warrant as a desirable alternative for police. *Id.*

they should not invalidate the warrant by interpreting the rule in such a manner. Applicable here is the principle that *Ventresca* states should guide the interpretation of an affidavit, *viz.*,

> the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.

Id. at 109 (citation omitted). Because the sworn presentation before the magistrate showed probable cause beyond question and no conceivable prejudice to the defendants has resulted from the procedure used, any doubts should be resolved in favor of the validity of the warrant.

It is also contended that the interruption of the proceeding before the magistrate, as shown on the tape recording, should be a ground for avoiding the warrant. It is pointed out that the 1977 amendment to the rule, in subparagraph (c)(2)(D), requires that all of the telephone calls be recorded, and that this was a subject of concern in the hearings that led to the adoption of that amendment. Proposed Amendments to the Federal Rules of Criminal Procedure, Hearings, *supra*, pp. 176-179. It is paragraph (c), as amended in 1972, now subparagraph (c)(1),[9] that applies here, and that provision contains no requirement that the magistrate record everything said in his presence before or after the sworn statement. Moreover, it appears from the tape itself, as well as from the testimony given at the hearing, that a full presentation on probable cause for the search was made and the magistrate announced that he found probable cause before the recorder was turned off; and that the discussion after the recorder was again turned on concerned only whether the search should be authorized after 10:00 P.M. The interruption in the tape does not require suppression of the evidence.

The defendants do not argue that their rights under the Fourth Amendment were violated by the procedure adopted here, and such an argument would be meritless. The Fourth Amendment does not require that probable

[9] See note 3, *supra*.

cause be established by an affidavit. *E.g., Gillespie v. United States*, 368 F.2d 1, 4 (8th Cir. 1966); see *Whitely v. Warden*, 401 U.S. 560, 565 n.5 (1971). Thus the Second Circuit has held that a search pursuant to a warrant based on a telephonic statement does not offend the Fourth Amendment. *United States v. Turner*, 558 F.2d 46, 50-51 (1977).

The same result should follow even if our interpretation of Rule 41(c)(1) were ultimately determined by the Supreme Court to be incorrect, having in mind the admonition of Rule 52(a):

> Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

Cf. United States v. Ravich, 421 F.2d 1196, 1201 (2d Cir.) *cert. denied* 400 U.S. 834 (1970). In the *Turner* case, it was contended that the telephonic search warrant procedure failed to comply in all respects with the state statute pursuant to which it was undertaken and would therefore be suppressed by a state court. The Second Circuit assumed that to be correct but nevertheless held that, because it was dealing with a federal prosecution, federal law determined whether suppression was appropriate; that, because a federal agent had a hand in the search, its validity had to be considered in the light of both Rule 41 and the Fourth Amendment; and, citing *United States v. Burke*, 517 F.2d 377, 386-387 (2d Cir. 1975), that even if Rule 41 was violated the violation would not lead to exclusion absent a showing of "prejudice" or "intentional and deliberate disregard of a provision of the Rule." The court said that there may be prejudice "in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed," citing *United States v. Burke, supra*, or in the denial of a substantial procedural safeguard. No such prejudice was found, and suppression was denied.

Application in the case at bar of these tests for prejudice produces the same result. First, as in *Turner*, it is clear that the warrant would have been properly issued if the facts stated orally had been set forth in the text of the affidavit. The defendants do not contest the finding

of probable cause. Moreover, as in *Turner*, "[t]he facts relied on to make up probable cause have been preserved both on tape and in written form, and they were supplied by witnesses whose identities are known and who were under oath."

Second, there is no basis for an inference that the government agents intentionally disregarded a provision in the rule. There is no evidence that they believed the procedure they followed violated the rule, and we can hardly say they acted unreasonably in adopting the interpretation of the rule we have held to be correct. Even if that interpretation ultimately proved wrong, therefore, application of the exclusionary rule would be inappropriate for the reasons stated in *Turner*, 558 F.2d at 51-53. *Cf. Stone v. Powell*, 428 U.S. 465, 486-487 (1976); *United States v. Harrington*, 504 F.2d 130, 134 (7th Cir. 1974).

Defendant Mendel also argues that the evidence should be suppressed because the magistrate failed to make a notation on the search warrant authorizing its execution after 10:00 P.M., as required by Rule 41(c)(1). Mendel concedes that there was ample reason to authorize the late search. The magistrate stated he was authorizing it, as the transcript of the tape recording shows. Under these circumstances, the technical violation of the rule does not require suppression. *United States v. Ravich, supra*, 421 F.2d at 1201.

We reverse the order appealed from and remand the case to the District Court for trial.

REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

Opinion by Judge Tone

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

May 10, 19 78

Before

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. PHILIP W. TONE, Circuit Judge

Hon. WILLIAM J. JAMESON, Senior District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

No. 77-1421 vs.

RONALD STEVEN MENDEL, KERRY LOWELL GRESS and ELIZABETH REEVES,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division
No. 76-Cr-1042
McGarr, Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED and REMANDED, in accordance with the opinion of this court filed this date.

* The Honorable William J. Jameson, Senior District Judge of the United States District Court for the District of Montana, is sitting by designation.

APPENDIX D

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

June 28, 19 78

Before

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. PHILIP W. TONE, Circuit Judge

Hon. WILLIAM J. JAMESON, Senior District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

No. 77-1421 vs.

RONALD STEVEN MENDEL, KERRY LOWELL GRESS and ELIZABETH REEVES,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 76-CR-1042

Frank J. McGarr, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by defendant-appellee Ronald Steven Mendel, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* The Honorable William J. Jameson, Senior District Judge of the United States District Court for the District of Montana, is sitting by designation.

Nos. 78-144 and 78-5156

In the Supreme Court of the United States

OCTOBER TERM, 1978

RONALD STEVEN MENDEL, PETITIONER

v.

UNITED STATES OF AMERICA

ELIZABETH REEVES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

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v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B)[1] is reported at 578 F.2d 668. The opinions of the district court granting petitioners' suppression motion and denying the government's motion for reconsideration (Pet. App. A) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1978. A petition for rehearing was denied on June 28, 1978. The petition for a writ of certiorari in No. 78-144 was filed on July 26, 1978, and the petition in No. 78-5156 was filed on July 28, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the requirements of Fed. R. Crim. P. 41(c)(1) concerning the issuance of a search warrant upon affidavit are satisfied where the facts establishing probable cause are set forth in oral recorded testimony under oath before the issuing magistrate and that testimony is incorporated by reference into the affidavit.

2. Whether, assuming that the procedures employed here did not satisfy Rule 41(c)(1), the evidence seized pursuant to the search warrant should have been suppressed.

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[1] "Pet. App." refers to the appendix in No. 78-5156.

RULE INVOLVED

At the time the warrant in this case was issued, Fed. R. Crim. P. 41(c)(1) provided in pertinent part:[2]

> A warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit. * * * The warrant shall be served in the daytime, unless the

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[2] The warrant in this case was issued on September 28, 1976. Although both petitioners and the courts below refer to former Rule 41(c) as being in effect on that date, Rule 41(c) became Rule 41(c)(1) effective August 1, 1976. See Pub. L. No. 94-349, Section 1, 90 Stat. 822. However, new subdivision (c)(2), which permits a magistrate to issue a warrant based upon telephone communications, did not become effective until October 1, 1977. At that time, the language of Rule 41(c)(1) was amended to include its present reference to the oral testimony provision of Rule 41(c)(2). See Pub. L. No. 95-78, Section 2(e), 91 Stat. 320.

issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. * * *

STATEMENT

On November 23, 1976, an indictment was returned by a grand jury of the United States District Court for the Northern District of Illinois charging petitioners and co-defendant Kerry Gress with conspiracy to manufacture and manufacture of methamphetamine, in violation of 21 U.S.C. 846 and 841(a)(1). In addition, petitioner Mendel was charged with possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and petitioner Reeves was charged with possession of methamphetamine, in violation of 21 U.S.C. 844.[3]

Following their indictment, petitioners moved to suppress evidence that had been seized pursuant to a search warrant, alleging that the affidavit in support of the warrant was insufficient under Rule 41(c), Fed. R. Crim. P. The district court granted their motion and suppressed the evidence (Pet. App. A).[4]

[3] A superseding indictment returned on December 28, 1976, contains no differences from the original indictment that are material to the disposition of this petition.

[4] The order of the district court suppressing the evidence was entered on March 4, 1977. The government sought reconsideration on the grounds, *inter alia*, that exigent circumstances would have justified a warrantless search and that petitioners lacked standing to challenge the search warrant. The district court rejected both of these claims in its order of September 29, 1977, denying the government's motion for reconsideration, and the government did not challenge these rulings on appeal.

The government appealed, and the court of appeals reversed and remanded the case for trial (Pet. App. B).

The facts surrounding the issuance of the search warrant are set forth in the court of appeals' opinion (Pet. App. B 2-3).[5] For approximately one week prior to September 28, 1976, agents of the Drug Enforcement Administration conducted an investigation that led them to believe that a coach house at 1910 North Mohawk Street, Chicago, Illinois, was being used for the unlawful manufacture of methamphetamine. The agents began continuous surveillance of the coach house on the morning of September 28, and by 3:20 p.m. they concluded that they had probable cause to obtain a search warrant. The agents' belief was based on their knowledge that quantities of chemicals used in manufacturing methamphetamine had been brought to the coach house and on their detection of an ether odor emanating from the premises. The ether odor indicated that the manufacturing process had entered its final stages and that a search would have to be made promptly to obtain evidence of manufacture.

At about 4:30 p.m. DEA agents arrived at the United States Attorney's office to seek assistance in

[5] The district court did not hold a suppression hearing. The facts recounted by the court of appeals are based on testimony given in the October 6, 1976, preliminary hearing following petitioners' arrest and in hearings held on May 24 and June 2, 1977, in which the government attempted to establish the existence of exigent circumstances for the search.

obtaining a search warrant. An Assistant United States Attorney prepared an affidavit to be executed by Agent Richard Ripley, using a printed form entitled "Affidavit for Search Warrant." The premises to be searched, the crime suspected of being committed, and the evidence of the crime believed to be present on the premises were all carefully described in this affidavit. After the printed phrase, "the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows," the words "(SEE ATTACHED AFFIDAVIT)" were typed but were then crossed out by hand. In their place, the words "Tape to be typed later and attached" were written (Pet. App. F).

At 9:00 that evening, the Assistant United States Attorney, Agent Ripley, another DEA agent, and a DEA chemist took the unsigned affidavit, a typed warrant and a tape recorder to the home of a federal magistrate. With the tape recorder running, Agent Ripley was sworn and proceeded to state in detail the facts tending to establish probable cause. Both the Assistant United States Attorney and the magistrate interrupted his statement several times with questions. At the conclusion of Agent Ripley's testimony, the magistrate announced that he was satisfied that probable cause existed and would issue the warrant. The time was stated to be 9:24 p.m.

The recorder was then turned off, but it was turned on again within a minute to record a discussion of when the search would be conducted. After hearing why there was good reason to delay the search until

after petitioners had returned to the coach house,[6] the magistrate announced that he would authorize a search after 10 p.m., so long as it was conducted within one hour after petiitoners had returned.

Agent Ripley signed the affidavit form under oath, and the magistrate issued the search warrant. DEA agents executed the warrant that night and found substantial amounts of methamphetamine, chemical manufacturing apparatus, and other miscellaneous evidence of criminal activity. Subsequently, the tape recorded proceedings were transcribed, the magistrate certified to the accuracy of the transcript, and the certified transcript was attached to the affidavit.

RGUMENT

Even if petitioners' claims would otherwise merit review, this Court should not now consider their challenge to the decision of the court of appeals. The ruling below places petitioners in precisely the same procedural position they would have occupied if the district court had denied their motion to suppress. That ruling could not have been reviewed before trial (*United States* v. *MacDonald*, No. 75-1892 (May 1, 1978), slip op. 11, n.7; *Abney* v. *United States*, 431 U.S. 651, 659, 663 (1977); *Cogen* v. *United States*,

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[6] One of the agents informed the magistrate that petitioners and the other individual apparently involved in the manufacturing process had left the coach house and might not return by 10 p.m. The agent explained that they preferred to have one of these persons present during the search because interruption of the manufacturing process creates a risk of explosion (Pet. App. B 3 n.2).

278 U.S. 221, 227 (1929)), and the same considerations that counsel against interlocutory appeals of denials of suppression motions also weigh against review of the suppression issue by this Court at this stage of the proceedings. Petitioners were indicted almost two years ago and have not yet been tried. At trial they may be acquitted, in which event their claims will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed, they will then be able to present all of their contentions to this Court by seeking review of the final judgment.

In any event, petitioners' claims are unpersuasive:

1. Petitioners contend that the evidence seized in the search should be suppressed because Agent Ripley's sworn statement of probable cause was not set forth in the written affidavit submitted to the magistrate. They argue that the procedure followed here did not comply with Fed. R. Crim. P. 41(c)(1), which provides in part that "[a] warrant shall issue only on an affidavit or affidavits sworn to before the federal magistrate * * * and establishing the grounds for issuing the warrant." The court of appeals properly concluded that petitioners' interpretation of Rule 41(c)(1) was unduly narrow and that "the recording of the sworn statement made before the magistrate was properly incorporated by reference into the affidavit and made a part of it" (Pet. App. B 4).

At base, petitioners' argument rests entirely on the claim that the term "affidavit" as used in Rule 41

(c)(1) refers only to the written document submitted to the magistrate. But Rule 41(c)(1) itself provides explicit authority for considering oral recorded testimony made under oath before the magistrate as part of the "affidavit" required by the rule. Rule 41(c) was amended in 1972 to provide that the magistrate may examine the affiant under oath and that "such proceeding shall be taken down by a court reporter or recording equipment *and made part of the affidavit*" (emphasis added). This provision makes clear that in determining whether an affidavit established sufficient grounds for issuing a warrant, the written document submitted to the magistrate is to be considered together with any recorded sworn testimony given before him.[7] Since it is undisputed that the written document and oral proceedings in this case, taken together, "showed probable cause beyond ques-

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[7] Prior to the 1972 amendment, there was a conflict among the circuits as to whether facts adduced in sworn oral testimony before the magistrate but not set out in the written affidavit could be considered in determining the existence of probable cause. Compare *United States* v. *Hill*, 500 F.2d 315, 320-321 (5th Cir. 1974), cert. denied, 420 U.S. 931 (1975), and *Leeper* v. *United States*, 446 F.2d 281, 285 (10th Cir. 1971), cert. denied, 404 U.S. 1021 (1972), with *United States* v. *Anderson*, 453 F.2d 174, 177 & n.3 (9th Cir. 1971). The Advisory Committee Notes to the 1972 amendment state that the provision for recording oral testimony and making it part of the affidavit was included "to insure an adequate basis for determining the sufficiency of the evidentiary grounds for the issuance of the search warrant if that question should later arise" (56 F.R.D. 143, 169).

tion" (Pet. App. B 9), the affidavit requirement of Rule 41(c)(1) was satisfied.[8]

Although petitioners contend that the 1972 amendment was designed to permit only oral supplementation of a written statement of probable cause, it is their construction of the rule, not that of the court of appeals, that exalts form over substance. Contrary to petitioners' assertion that a written statement of probable cause is needed to insure careful decision by the magistrate, the law generally prefers spontaneous oral testimony, subject to immediate examination, to a written document, especially one that generally is not prepared by the affiant. As the court of appeals observed (Pet. App. B 8), "[o]ral testimony before the magistrate will often be more likely than an affidavit to assure that the magistrate will make an independent judgment based on the facts and not rely on the mere conclusions of the officer." Moreover, the procedure followed here was fully consistent with the two-fold purpose of the affidavit requirement: to insure that the magistrate "may judge for himself the persuasiveness of the precise facts relied on to show probable cause" and to provide a record on which a court may review the sufficiency of the facts presented to the magistrate. *United States* v. *Anderson*, 453 F.2d 174, 177 (9th Cir. 1971).

In short, no logical purpose would be served by concluding that Rule 41(c)(1) is satisfied if some

[8] The document submitted to the magistrate was not merely "a few written words" (Reeves Pet. 9). It contained information vital to a valid affidavit—a particular description of the place to be searched and the items to be seized.

written statement of probable cause is made—even though crucial elements are supplied only by oral testimony—but violated if no facts appear in writing. The court of appeals correctly reasoned that whether oral testimony before the magistrate supplements a written statement or provides the entire basis for determining the existence of probable cause, "the rule contemplates that in either case the recording, when incorporated by reference, is to be considered a part of the affidavit" (Pet. App. B 6).

The decision below is not inconsistent with the 1977 amendments to Rule 41(c). New subdivision (c)(2) added by those amendments, although broadly captioned "Warrant Upon Oral Testimony," concerns warrants upon sworn oral testimony of a person who is not in the physical presence of a magistrate, primarily warrants issued following telephone conversations.[9] The fact that telephonic search warrants were authorized in 1977, however, hardly indicates that oral testimony before the magistrate was previously improper, particularly in view of Rule 41(c)(1)'s explicit provision for such testimony. Personal appearance affords a crucial opportunity for the evaluation of demeanor evidence that is absent in the tele-

[9] Rule 41(c)(2)(A) provides that "[i]f the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means." Subsequent provisions of subdivision (c)(2) set out procedures for preparing a "duplicate original warrant" and an "original warrant," placing the applicant-"caller" under oath, and recording or transcribing the call.

phonic procedure; despite this drawback the telephonic procedure was approved.[10]

Finally, petitioner Reeves' suggestion (Pet. 15-17) that the decision below would permit the government to circumvent the strict recordation requirements of Rule 41(c)(2)(D) is insubstantial.[11] To begin with, Rule 41(c)(1) contains its own recordation requirement. But more important, since the telephonic procedure was designed to permit agents to obtain a warrant where personal appearance before the magistrate is impractical, it is exceedingly unlikely that agents would appear solely to avoid a requirement that "all of the call" be recorded. In any event, any preference for personal appearances rather than telephonic communications that did develop would seem

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[10] Concern over the absence of a personal appearance before the magistrate obviously formed much of the basis of Representative Holtzman's reservations about the telephonic procedure, cited by petitioner Reeves (Reeves Pet. 14-15).

[11] Subdivision (c)(2)(D) provides in part that "[i]f a voice recording device is available, the Federal magistrate shall record by means of such device all of the call after the caller informs the Federal magistrate that the purpose of the call is to request a warrant." Petitioner Reeves contends that, in view of this provision, even if the oral procedure employed here was otherwise permissible the warrant should be voided because the tape was interrupted. As the court of appeals noted (Pet. App. B 9), however, subdivision (c)(2)(D) is inapplicable in this case. Moreover, it is doubtful that this provision would be considered violated even if applicable, since the interruption complained of lasted less than one minute and occurred after the magistrate had determined that the warrant should issue.

beneficial, since the former procedure is undeniably the more desirable.[12]

2a. Even assuming that the procedure employed here did not comply with Rule 41(c)(1), it does not follow that the evidence seized in the search should be suppressed. This case clearly involves no violation of petitioners' constitutional rights, since the Fourth Amendment does not require that a sworn statement in support of a search warrant be reduced to writing.[13] What occurred was at most an unintentional violation of Rule 41's procedural requirements, which did not prejudice petitioners in any respect. In these circumstances, the court of appeals correctly concluded that application of the exclusionary rule would not be proper regardless of whether the warrant application failed to comply fully with Rule 41 (Pet. App. B 9-11).

This Court has noted that "[a]s with any remedial device, the application of the [exclusionary] rule has

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[12] Petitioner Mendel also suggests (Pet. 11-12) that, since Rule 41(c)(2)(A) permits telephonic warrants where "circumstances make it reasonable to dispense with a written affidavit," this Court should consider whether there were sufficient reasons to justify oral testimony in this case. Apart from the fact that the 1977 amendments are not applicable here, this argument ignores Rule 41(c)(2)(G), which provides that a suppression motion may not be based on the ground that "circumstances were not such as to make it reasonable to dispense with a written affidavit."

[13] See, *e.g.*, *United States* v. *Turner*, 558 F.2d 46, 50 (2d Cir. 1977); *United States* v. *Hill*, *supra*, 500 F.2d at 321; *Gaugler* v. *Brierley*, 477 F.2d 516, 522 (3d Cir. 1973); *Sherrick* v. *Eyman*, 389 F.2d 648, 652 (9th Cir.), cert. denied, 393 U.S. 874 (1968).

been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). Accordingly, the courts have generally been unwilling to extend the severe remedy of suppression, with its consequent impairment of the truth-finding process, to cases involving only technical or ministerial violations of Rule 41 that do not implicate any substantial rights.[14] As Judge Friendly has observed, "violations of Rule 41 alone should not lead to exclusion unless (1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule." *United States* v. *Burke*, 517 F.2d 377, 386-387 (2d Cir. 1975) (footnotes omitted). The Second Circuit has applied the *Burke* test in re-

[14] See, *e.g.*, *United States* v. *Garrett*, 565 F.2d 1065, 1071 (9th Cir. 1977), cert. denied, No. 77-6178 (Apr. 17, 1978) (failure of warrant to name magistrate to whom return was to be made and agent's failure to make prompt return did not require suppression); *United States* v. *Burgard*, 551 F.2d 190, 193 (8th Cir. 1977) (error in making return to state court judge rather than federal magistrate did not make suppression of the evidence appropriate); *United States* v. *Dauphinee*, 538 F.2d 1, 3 (1st Cir. 1976) (failure of agent to inventory a seized revolver did not require its exclusion); *United States* v. *Hall*, 505 F.2d 961, 964 (3d Cir. 1974) (failure of agent to file inventory promptly did not warrant suppression). But see *United States* v. *Hittle*, 575 F.2d 799 (10th Cir. 1978), affirming the suppression of evidence because of the failure of a state judge to record sworn, oral testimony supplementing a search warrant affidavit, without any discussion of the propriety of applying the exclusionary rule.

fusing to suppress evidence in circumstances analogous to this case. In *United States* v. *Turner*, 558 F.2d 46, 51-53 (2d Cir. 1977), the court assumed that the issuance of a warrant on telephonic communications prior to the 1977 amendments violated Rule 41(c), but it nonetheless concluded that the error did not require application of the exclusionary rule.[15]

Here, as in *Turner*, there is no indication of any intentional disregard of Rule 41. Government agents merely followed what they believed to be a permissible procedure for obtaining a warrant, and the reasonableness of their belief can hardly be questioned in light of the court of appeals' conclusion that they had been correct.[16] Nor did the claimed violation of the rule result in any conceivable prejudice to petitioners, since "it is clear that the warrant would have been properly issued if the facts stated orally had been set forth in the text of the affidavit" (Pet.

[15] Although *Turner* involved a state search warrant issued to state and federal law enforcement officers in a state that did permit a telephonic warrant procedure, the court concluded that the warrant had to be tested in light of Rule 41 because of the federal involvement in the search. 558 F.2d at 49.

[16] In ordering suppression, the district court distinguished *Turner* on the grounds that this case involved federal agents who knew they were acting under federal rules; it charged them with knowledge of the requirements of Rule 41 and viewed their good faith as irrelevant (Pet. App. A 4). But an "absolute liability" standard, even for federal agents acting under federal rules, does not advance the purposes of the exclusionary rule and ignores the admonition in Rule 52(a) that "[a]ny error * * * which does not affect substantial rights shall be disregarded."

App. B 10). Finally, petitioners were "not deprived of any substantial procedural safeguard provided for in Rule 41." *United States* v. *Turner*, *supra*, 558 F.2d at 53. As noted earlier, the agent's in-person oral testimony was, if anything, more conducive to an independent evaluation of probable cause by the magistrate than the mere submission of a written statement. In addition, "[t]he facts relied on to make up probable cause have been preserved both on tape and in written form, and they were supplied by witnesses whose identities are known and who were under oath." *Ibid.*

Thus, no deterrent or other remedial purpose would be served by suppressing the evidence seized in the search. Notably, the 1977 amendments to Rule 41(c) specifically provide that use of the telephonic rather than affidavit procedure shall not be grounds for suppressing evidence obtained pursuant to an otherwise valid warrant. Fed. R. Crim. P. 41(c)(2)(G). Although not applicable in this case, this provision is further proof that the oral testimony procedure followed here was at most a technical violation of Rule 41, for which the drastic sanction of the exclusionary rule would not be appropriate.

b. The above analysis is equally applicable to petitioner Mendel's additional claim (Mendel Pet. 13-14) that the evidence should be suppressed because the magistrate did not make a notation on the warrant authorizing its execution after 10 p.m., as required by Rule 41(c)(1). It is undisputed that the magistrate had sufficient reason to authorize the nighttime

search, and both the justification for the late search and the authorization appear on the transcribed tape of the proceedings before the magistrate. In these circumstances, the technical violation of the rule does not warrant suppression.[17]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1978

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[17] Petitioner Reeves appears to suggest that the evidence should also be suppressed because the warrant, even if valid, was executed with excessive force (Reeves Pet. 18). As she notes, this claim was not addressed by either the district court or the court of appeals, and understandably so; on appeal, for example, petitioner's sole reference to this issue appears to have been limited to a footnote in her brief suggesting, *inter alia*, that she was arrested without probable cause.

In any event, her claim is without merit. The record indicates that the warrant was executed by three or four DEA agents who approached petitioners' car with drawn weapons, identified themselves, and asked the three occupants to leave the vehicle. Subsequently, when refused keys to the coach house, one of the agents kicked in the door to gain entry for the search (May 24, 1977, Tr. 34-35, 58-62).

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